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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD BENO EWING,

Defendant and Appellant.

E053816

(Super.Ct.No. FMS900250)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed with directions.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

# **I**

## **INTRODUCTION**

On May 28, 2009, a complaint charged defendant and appellant Richard Beno Ewing with possession of cocaine under Health and Safety Code section 11350, subdivision (a). The complaint also alleged that defendant had previously suffered a prison prior within the meaning of Penal Code<sup>1</sup> section 667.5, subdivision (b).

On June 3, 2009, defendant pled guilty to count 1 and admitted the prison prior. On June 15, 2009, the trial court sentenced defendant to three years' probation under section 1210.1. On November 3, 2009, defendant admitted violating his section 1210.1 probation, and was placed on general felony probation and admitted into drug court. Defendant failed to appear for drug court review on April 20, 2010, and probation was revoked. On May 9, 2011, defendant was sentenced to four years in prison.

On June 10, 2011, defendant filed a notice of appeal. On appeal, defendant contends that the trial court erred in failing to award him presentence conduct credits under section 4019. For the reasons set forth below, we shall remand this case to the trial court for calculation of section 4019 credits.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

## II

### ANALYSIS<sup>2</sup>

Defendant contends that the trial court erred in failing to award any custody credits under section 4019, including credits he claims he earned after May 9, 2011, the day defendant was remanded into custody for immediate delivery to the Department of Corrections.

#### *A. Procedural Background*

On November 3, 2009, defendant admitted violating his section 1210.1 probation. He was then placed on general felony probation and admitted into drug court.

On March 9, 2010, defendant was provided with the terms of drug court and agreed to them. Specifically, defendant initialed and signed a drug court application and agreement, which stated, “I also waive all P.C. 4019 credits as a condition of participating in the drug court treatment program.” Defendant also confirmed that he could “read and understand English,” and that he had time to read the “statement of rights and the Agreement [and] placed [his] initials in each box to the left of each paragraph of this Agreement to signify that [he] understand[s] and adopt[s] as [his] own, the statements, which correspond to those lines.”

On April 20, 2010, defendant failed to appear for drug court review. Probation was revoked and a warrant was issued for his arrest. Defendant was arrested on April 27, 2011. On May 9, 2011, the trial court found defendant no longer amenable for drug court

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<sup>2</sup> The details of defendant’s criminal conduct are not relevant to the limited issue he has raised in this appeal, and we will not recount them here.

and terminated him from the program. Probation was revoked and terminated, and defendant was “remanded to the custody of the sheriff for immediate delivery to the Department of Corrections.” That same day, defendant was sentenced to four years in prison, with 72 days actual custody credit. The court found that “PC 4019 credits were waived in order to participate in Drug Court program.”

### *B. Discussion*

Defendant does not argue that his waiver of section 4019 credits is invalid. Instead, defendant argues that he is entitled to section 4019 credits prior to and after his participation in the drug court program. The People, however, argue that defendant waived all past and future section 4019 credits. We agree in part with both parties. For the reasons set forth below, we shall remand this case for calculation of section 4019 credits accrued *after* defendant signed his waiver.

Here, there is no dispute that defendant initialed and signed a drug court application and agreement, which stated, “I also waive all P.C. 4019 credits as a condition of participating in the drug court treatment program.”

In *People v. Black* (2009) 176 Cal.App.4th 145, 152, a defendant signed the exact same waiver: “I also waive all [section] 4019 credits as a condition of participating in the DRUG COURT TREAEMENT PROGRAM.” In *Black*, the People argued that the waiver applied to all section 4019 credits accrued *prior* to the execution of the waiver. (*Black*, at p. 155.) The People, however, conceded that “defendant should have been awarded section 4019 credits for any time spent in custody *after* September 24, 2007 [the date the waiver was executed], and a limited remand for a proper calculation of credits

[was] therefore appropriate.” (*Black*, at p. 155.) In *Black*, we agreed with the People’s position. (*Ibid.*) “On the record before us, we cannot detect a basis for disagreeing with the People’s position.” (*Ibid.*)

Moreover, cases discussing waiver of appeal have found that “[a] broad or general waiver of appeal rights ordinarily includes error occurring *before but not after the waiver* because the defendant could not knowingly and intelligently waive the right to appeal any unforeseen or unknown future error.” (*People v. Mumm* (2002) 98 Cal.App.4th 812, 815, italics added.) “Thus, a waiver of appeal rights does not apply to “possible future error” [that] is outside the defendant’s contemplation and knowledge at the time the waiver is made.”” (*Ibid.*, quoting *People v. Panizzon* (1996) 13 Cal.4th 68, 85.)

Based on the above, we find that defendant waived his section 4019 credits prior to the execution of his waiver, but not after. Therefore, the trial court erred in failing to award section 4019 custody credits for time defendant spent in custody after the execution of the agreement.

### III

#### DISPOSITION

The case is remanded for the limited purpose of calculating conduct credits under section 4019 for the time spent in custody after May 9, 2011. The trial court is directed to determine defendant's conduct credits earned after May 9, 2011; to amend its minutes accordingly; to correct the abstract of judgment; and to forward a certified copy of any revised order to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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MCKINSTER  
J.

We concur:

RAMIREZ  
P. J.  
KING  
J.